Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

BEATRICE ROSARIO,

Petitioner,

v.

KEN CREST SERVICES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

This case presents an important issue of law involving adverse employment action in discrimination cases and the dangerous precedent established by the Third Circuit. The split causes jurisdictions to apply different standards and burdens of proof to prove a discriminatory employment act and the employer's alleged non-discriminatory purpose. Such a different standard by the Third Circuit is against public policy and will only cause plaintiffs to forum shop. A unified standard of proof must be applied.

In our facts, the courts deviated from the applicable standard of proof. The lower courts erroneously concluded that Petitioner failed to meet the criteria in proving discrimination. However, there are genuine issues of facts, and at minimum inferences in Petitioner's favor, to prove each element of the cause of action. Moreover, given the necessary burdens of proof, the Employer failed to provide a reasonable non-discriminatory explanation of its decision under the applicable case law.

The above rulings on critical issues were further complicated when the lower courts deviated from this Honorable Court's decisions and standard in the issuance of a summary judgment in discrimination cases, especially when no proper investigation was conducted. Thus, summary judgment should have been denied so that findings of facts and assessment of credibility be weighed by the jury in light most favorable to the Petitioner. *Reeves v. Sanderson Plumbing Products, Inc.* 530 U.S. 133 (2000).

There is an apparent and growing danger to the Civil Rights Laws, especially when there is a botched investigation of discrimination complaints for various reasons. If the investigation is improper, then the claimant's due process rights are violated and the purpose and enforcement of Civil Rights Laws are diluted. Thus, the Writ should be granted.

I. WHETHER THE LOWER COURTS DEVIATED FROM SUPREME COURT CASES AND FRACTURED THE LAW OF A NON-DISCRIMINATORY LEGITIMATE PURPOSE IN AN EMPLOYMENT DISCRIMINATION CASE AND ERRONEOUSLY GRANTED THE EMPLOYER'S MOTION FOR SUMMARY JUDGMENT SINCE THERE EXISTED MATERIAL ISSUES OF DISPUTED FACTS THAT SHOULD HAVE BEEN RESOLVED BY A TRIER OF FACT AND THAT THE EMPLOYER FAILED TO MEET ITS BURDEN OF PROOF UNDER THE APPLICABLE LAW IN A VIOLATION OF PETITIONER'S DUE PROCESS RIGHTS?

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The Judgment and Decision of the United States Court of Appeals for the Third Circuit dated June 5, 2006, is set forth in the Appendix A, p. 1a. The Decision of the United States District Court for the Eastern District of Pennsylvania dated July 8, 2005, is set forth in the Appendix C, p. 29a.

This Writ is timely filed.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C. Section 1254. The United States Court of Appeals for the Third Circuit issued its Decision in this case on June 5, 2006. This Writ has been filed within the ninety day period.

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED IN THIS CASE

Fourteenth Amendment of the United States Constitution:

> The Due Process Clause of the Fourteenth Amendment provides that no State "shall ... deprive any person of life, liberty, or property, without due process of law...."

Civil Rights Act of 1964 (as amended) 42 U.S.C. Section 2000e et. seq. (Title VII) §703 (a):

> It shall be an unlawful employment practice for an employer- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Fed.R.Civ.P. 56 (Summary Judgment)

Rule 56(c) states in pertinent part that summary judgment will be granted only:

If the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

STATEMENT OF CASE AND FACTS

I. PROCEEDINGS AND DISPOSITION OF THE CASE BELOW.

The underlying action involved the wrongful termination of a dedicated employee based on her national origin and race, and the former employer's failure to provide a legitimate non-discriminatory reason for her discharge.

Beatrice Rosario, the Plaintiff-Petitioner, hereinafter referred to as "Petitioner", filed a complaint on October 8, 2004, against her former employer, Ken Crest Ser, hereinafter referred to as the "Employer", in the United States District Court the Eastern District of Pennsylvania alleging employment discrimination based on her national origin and race of Liberian.

On March 15, 2005, the Employer filed a Motion for Summary Judgment. Petitioner filed an Opposition on April 1, 2005. The District Court granted the Employer's motion on June 6, 2005.

As a result, Petitioner timely filed a Notice of Appeal to the Third Circuit Court of Appeals. On June 5, 2006, the Third Circuit affirmed the District Court's Opinion.

II. STATEMENT OF FACTS.

Petitioner is a black female born in Liberia, Africa. She worked as a Community Home Supervisor with the Employer for approximately eleven and a half years. Originally she was a direct caregiver, and after four and a half years, she was promoted to Community Home Supervisor due to

her outstanding work. The Employer's policy was to approach an employee and ask whether they wanted a higher position. After Petitioner was once approached, she was never considered again for any other vacancy, including a Program Director job that she had more qualifications, education and experience than the hired person.

On August 30, 2003, the Employer had a social function at one of their facilities. Petitioner attended the function. At the function, one of the consumers, Mario Garcia, was sitting outside the building with others. Thereafter, Mr. Garcia started to continuously refer to Petitioner as a "bitch". After several times, Petitioner approached Mr. Garcia, tapped him on the shoulder, and whispered in his ear and redirected him.

A short time later, Answard Hopewall, a case manager, complained that Petitioner abused and hit an Employer's resident without any supporting evidence. No law enforcement officer was called, which is the policy when an abuse occur, to obtain a police report. Petitioner denied the allegation and stated that she never hit Mr. Garcia but redirected him.

The Employer instructed Pauline Baker,[1] another employee, to conduct an investigation. Ms. Baker and another

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[1] Petitioner learned that Ms. Baker was accused of abuse by a resident, but her position was not terminated but instead was promoted to the position of Program Director even though a college graduate should have held said position.

employee, Priscilla Reid[2], continuously harassed the Petitioner questioning her of her finances, clothes, vehicles and wedding in 2000. Petitioner was continuously subjected to their conduct. Ms. Baker and Ms. Reid stated that Africans like Petitioner should not be able to achieve more success than African Americans in the United States. Another director, Harry Peck, continuously questioned Petitioner's expenses, paperwork, shopping and time and would embarrass her when together.

Among others, Ms. Baker spoke via telephone to Ibrahim Tunkara[3], Geraldine Trower[4] and Christopher Suah[5] – all of whom during the phone conversation failed to recollect the incident. Mr. Tunkara denied any abuse. Only one other employee, Sandra Brown, originally stated that she witnessed Petitioner hitting Mr. Garcia on the face. Later at her deposition, she could not recall the events of the outing and testified that she saw Petitioner touch Mr. Garcia with her fingers on his cheek. Also, as indicated in the deposition, Case Manger Hopewell checked her paperwork and she had to be in agreement with what she said. Petitioner asked

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[2] In fact, Ms. Reid wrote a glowing relationship about Petitioner.

[3] Mr. Tunkara testified that he did not witness the incident.

[4] Ms. Trower testified and also wrote a statement that she did not witness an incident.

[5] Mr. Suah wrote a statement that he did not see anything or observe the incident.

at the social function. Ms. Baker denied the request and she based her opinion just on phone conversations. The lower courts erroneously accepted the testimonies of the alleged witnesses even though the witnesses could not recall the events.

After the internal investigation, the Employer concluded that the incident occurred. On September 15, 2003, she was terminated from her position. Petitioner appealed her termination to the Director of Residential Services, Mr. Peck, but it was upheld. However, Mr. Peck did not conduct an investigation as he said he would with the witness.

Petitioner claimed that she was terminated due to her race (black) and national origin (Liberia). She appealed the decision to the Director. Meanwhile, Ms. Reid, a friend of Ms. Baker, was hired to fill Petitioner's position – even prior to the conclusion of the investigation and appeal process.

As a result of her wrongful termination, Petitioner filed an employment discrimination case against the Employer. She originally filed a Charge of Discrimination with the Pennsylvania Human Relations Commission on January 13, 2004. The complaint was dismissed and she received a Notice of Right to Sue in July 2004.

On December 8, 2004, Petitioner filed a complaint with the United States District Court.

ARGUMENT IN SUPPORT OF WRIT FOR CERTIORARI

I. THE LOWER COURTS DEVIATED FROM SUPREME COURT CASES AND FRACTURED THE BURDEN OF PROOF IN A WRONGFUL TERMINATION CASE AND WRONGFULLY GRANTED THE EMPLOYER'S MOTION FOR SUMMARY JUDGMENT EVEN THOUGH THERE EXISTED MATERIAL ISSUES OF DISPUTED FACTS AS TO THE EMPLOYER'S NON-DISCRIMINATORY LEGITIMATE PURPOSE OF TERMINATING PETITIONER THAT SHOULD HAVE BEEN RESOLVED BY A TRIER OF FACT RESULTING IN A VIOLATION OF HER DUE PROCESS RIGHTS.

This Honorable Court's review is necessary to resolve the issue of the burden of proofs in a wrongful termination case when there exists a failure to investigate a discrimination claim and terminate an employee when no substantial credible evidence exists to justify termination. The Third Circuit and District Court of Pennsylvania failed to apply the proper standards for burden of proof both by the Petitioner and the Employer. Instead, their decisions stand for the proposition that if the investigation lacks evidence of a non-discriminatory purpose for termination, summary judgment would be granted. In fact, given this Court's prior decisions, the opposite holds true. The Third Circuit has set a dangerous precedent.

A dismissal ought not to be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v Gibson*, 355 U.S. 41, 46 (1957); *Jones v. Smith*, 99 F.R.D. 4 (1983). Courts may not dismiss a complaint for insufficiency unless it clearly appears that by no stretch of the imagination is plaintiff entitled to any relief for claims asserted in his complaint. *Kozlowski v. Ferrarra*, 117 F.Supp. 650 (1954). Given this high standard of proof, Petitioner should have been given the opportunity to present her case before the jury – no jury has had the opportunity to weigh the evidence of her discrimination allegations since the District Court entered summary judgment based upon her alleged failure to meet her burden of proof. The District Court failed to recognize the material issues of disputed facts as to whether an incident actually occurred. Since the inferences should have been made in Petitioner's favor, it was, in fact, the Employer's failure to provide a legitimate purpose for terminating Petitioner.

Moreover, the District Court failed to allow further discovery as to whether non-members of the protected class were treated more favorably or that the circumstances of her termination raise an inference of discrimination. Thus, Petitioner was entitled to conduct further discovery as to these issues as well as have her case presented to a jury.

When considering whether to grant summary judgment, the Court should have determined whether the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits show that there is a genuine issue as to any material fact and that the moving party is en-

titled to judgment as a matter of law. Fed.R.Civ.P. 56(c). In making this assessment, the Court must "accept all reasonable inferences favorable to the nonmovant." *Feliciano v. State of Rhode Island,* 160 F.3d 780. 788 (1st Cir. 1998). The courts failed to give credence that Petitioner was harassed by two coworkers and questioned her financial status. Petitioner testified that two employees Priscilla Reid and Pauline Baker frequently questioned her regarding her finances, her income, her income's finances, her wedding, and her vehicle. Moreover, these same two women commented to others, including another former employee Gertrude Murphy, that Petitioner was flamboyant even though she was African. The negative comments commenced after Petitioner's wedding in August of 2000 until she was terminated. Such continuous negative comments regarding Petitioner's "African" background and financial status inferred a discriminatory pattern of behavior. Answard Hopewall, a case manager, also referred her to as "African". Petitioner wanted to be referred to as an American since obviously at the workplace being "African" was not a compliment. Even though there were other Africans who worked with the Employer, Petitioner was discharged because she was Liberian. She was not born in the United States, and thus, treated and regarded different than the African-Americans. Nonetheless, such pattern of behavior that the Employer allowed was sufficient to create a genuine issue of material fact to overcome summary judgment.

In deciding whether a factual dispute is "genuine," the Court must determine whether the evidence is such that a reasonable jury could return a verdict for the nonmoving

party. *Id.*; *see also Fajardo Shopping Center, S.E. v. Sun Alliance Ins. Co. of Puerto Rico, Inc.*, 167 F.3d 1, 7 (1st Cir. 1999); *De-Jesus-Adorno v. Browning Ferris Indus. Of Puerto Rico,* 160 F.3d 839, 841-842 (1st Cir. 1998) ("A trial worthy issue exists... [if] the evidence is 'sufficiently open-ended to permit a rational factfinder to resolve the issue in favor of either side.'"); *Feliciano* at 784; *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-25, 106 S.Ct. 2548 (1986). In weighing whether a factual dispute is "material," the Court must examine the substantive law of the case, because "only disputes over the facts that might affect the outcome of the suit under governing law will properly preclude the entry of summary judgment." *Anderson* at 248; see also *De-Jesus-Adorno* at 841-42 ("A trialworthy issue exists if the evidence is such that there is a factual controversy pertaining to an issue that may affect the outcome of the litigation under the governing law.") In our facts, trialworthy disputed material facts existed, that is, whether the incident actually occurred and whether her termination was based upon discriminatory practices.

Given the burden to prove discrimination, the Petitioner met her burden of proof to meet the elements of each cause of action, and at minimum, the inferences should have been ruled in her favor to overcome summary judgment.

Given the questionable evidence of whether an incident even occurred and the continuous discriminatory comments made to the Petitioner, the Employer's motive was central to the case. Employment discrimination cases should be disposed of at summary judgment only with "extreme caution". *See Beard v. Annis*, 730 F.2d 741, 743 (11th Cir. 1984).

To constitute an adverse employment action, an act must result in a loss in pay or benefits, a detrimental change in responsibilities, a negative change in the terms and conditions of employment, or some such actual and unfavorable change in job status. *Birone v. Indian River Sch.,* 145 F.3d 1329 1998. Of course, Petitioner had a change of terms of her employment opportunities that was based on a discriminatory practice.

Petitioner submitted sufficient circumstantial evidence to meet her burden of proof; however, her right was wrongfully taken away. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), the Supreme Court established the standard necessary for Petitioner to meet her burden of proof with respect to her discrimination claim. The Court stated that in order to establish a prima facie case of discriminatory treatment under the evidentiary framework in Title VII of the Civil Rights Act of 1964 cases, the plaintiff must prove that: (1) he/she belongs to a racial minority; (2) he/she applied and was qualified for a job for which the employer was seeking applicants; (3) despite the plaintiff's qualifications, the plaintiff was rejected; and (4) after such rejection, the position remained open and the employer continued to seek applicants from persons of the plaintiff's qualifications. Once the plaintiff has met this initial burden, the burden of production shifts to the employer to articulate some legitimate, nondiscriminatory reason for the plaintiff's rejection; if the trier of facts finds that the elements of the prima facie case are supported by a preponderance of the evidence and the employer remains silent,

then the court must enter judgment for the plaintiff. *Id.* The circumstantial evidence was overwhelming.

Contrary to the lower courts' decisions, Petitioner met the four prong test under *McDonnell Douglas,* including the fourth prong. Circumstances of her termination raised an inference of discrimination. There was conflicting evidence of whether an incident even occurred, and Petitioner was denied promotions on two occasions. The Employer's discriminatory practice was not against blacks, but where they were born, that is either America or Africa.

Thus, Petitioner properly argued discrimination by circumstantial evidence, all of which must be ruled in her favor under Fed.R.Civ.P. 56. Since the case was before the lower court on a summary judgment, Petitioner was entitled to the inference that the Employer discriminated against her due to her race.

In light of the recent case law stated in *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133 (2000), Petitioner met her burden of proof. The *Reeves* case has clarified a controversy which existed in the federal circuits regarding a claimant's burden of proof in a discrimination action. Under *Reeves*, once the *McDonnell* criteria for establishing a prima facie case have been met, then the employer must come forward with a legitimate, non-discriminatory basis for its actions. If the employer's explanation is found not to be credible, then a finding of unlawful discrimination may be sustained, and the claimant does not need to produce further evidence of discriminatory intent. The Supreme Court justified its decision by stating that once the employer's justifica-

tion has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision. *Id.*

Under the *Reeves* standard, once Petitioner met the four *McDonnell* criteria, then if the Court finds that the Employer's explanation of its actions not to be credible, there must be a finding of discrimination. There is no more shifting of burdens of proof and persuasion back to Petitioner. The Employer cited unsubstantiated and conflicting reasons for the termination.

Under the test, the burden then shifted to the Employer to prove that they had a legitimate non-discriminatory reason for taking the action. The Employer had misleading and false statements to respond to the discrimination allegations. There was no conclusive evidence or proof, just mere allegations of a hitting incident. Instead, Petitioner submitted evidence of satisfactory and exceptional performance appraisals. Proof that the employer's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination even though it is persuasive. *St. Mary*, at 517. In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. *Wright v. West*, 505 U.S. 277, 296, 112 S.Ct. 2482 (1995). As emphasized, it is the trier of fact, and not the judge on a summary judgment motion, to weigh the credibility of the explanation. Petitioner was entitled to the inference that she had met the fourth prong of the *McDonnell Douglas* analysis.

If given the opportunity, Petitioner would submit substantial evidence to discredit any proffered reason that discrimination was more likely than not a motivating or substantial cause of the adverse action. *See Fuentes v. Perskie*, 32 F.3d 759, 764 (3rd Cir. 1994); *Torre v. Casio, Inc.*, 42 F.3d 825, 830 (3rd Cir. 1994). Contrary to the Circuit Court's opinion, the Petitioner met her burden through a demonstration that such "weaknesses, implausibilities, inconsistencies, incoherences, or contractions in the employer's proffered legitimate reasons for its action [are such] that a reasonable factfinder could rationally find them 'unworthy of credence.'" *Fuentes*, at 765. As proven in the faulted investigation, the Employer's allegation of the Petitioner striking a patient was false since the alleged witnesses denied the incident. How could an employer state a reason without any supporting information? The above cited material disputed facts should have overcome the Employer's motion for summary judgment. Petitioner was entitled to inferences in her favor. The material disputed facts should have been determined by a jury factfinder. When the burden shifted back to the Petitioner (even though she contends that the Employer failed to meet its legitimate purpose burden), she raised sufficient inferences to discredit the Employer's defense.

Discrimination exists "in forms as myriad as the creative perverseness of human beings can provide. *McCorstin v. United States Steel Corp.*, 621 F.2d 749, 753-54 (5th Cir. 1980). Petitioner was discriminated against due to her origin of her race. She must be given the opportunity to pursue her constitutional rights of being heard and be treated equally under the laws.

Under the applicable law, Petitioner was entitled to the inference that she met her burden of proof. Further, Petitioner was entitled that the reasons were pretext and that there were no legitimate non-discriminatory reasons for her layoff. Thus, summary judgment was wrongfully granted.

The employer's explanation of its legitimate reasons must be clear and reasonably specific. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 250 (1981). Of course, in our facts, the Employer submitted unsubstantiated allegations of a "hitting" incident with a patient. Determinations of motive and intent, particularly in discrimination cases are questions better suited for the jury. *Petitti v. New England Telephone and Telegraph Co.*, 909 F.2d 28, 34 (1st Cir. 1990). Obviously, the Employer's motive and intent were central issues to the underlying cause of action. All of the above issues of disputed facts to establish the Employer's true intent must be presented to a jury.

Discrimination can be proved with direct or indirect evidence. *Meeks v. Computer Data Association International*, 15 F.3d 1013, 1019 (11th Cir. 1994); including presenting a statistical pattern in the actual workplace where the discrimination occurred. *Earley v. Champion International Corp.*, 907 F.2d 1077, 1081 (11th Cir. 1990). When there is evidence of disparate treatment as well as other circumstantial evidence, there is sufficient evidence of proof of pretext discrimination; the evidence does not need to reach the degree of certainty required of plaintiffs who present no proof of discrimination besides disparate treatment. *Scott v. County of Ramsey*, 180 F.3d 913 (1999). As evidenced in the facts, Petitioner received disparate treatment since she was African

and the overwhelming circumstantial evidence supports her claims of discrimination.

Petitioner showed a pattern of discriminatory behavior both prior to and after her complaints with the Employer thereby meeting her burden of proof to overcome a motion for summary judgment. *Smith v. St. Louis University*, 109 F.3d 1261 (8th Cir. 1997); *Harris, supra, at* 21. A statistical evidence of pattern of discrimination coupled with other evidence is a pretext for an employment discrimination case. *Bell v. Bolger*, 708 F.2d 1312 (1983). The statistical pattern is direct evidence that overcomes the standard for a motion for summary judgment. *See Kerns v. Capital Graphics, Inc.*, 178 F.3d 1011(1999). The lower courts forced the Plaintiff to prove the Employer's defense in violation of applicable case law. The Employer had the burden of proof. However, the investigative process was flawed and the evidence gathered suggested a discriminatory environment.

Regarding intentional botched or refusal to further investigate claims of meritorious nature and the granting of summary judgment on those issues that was not investigated or addressed by the lower courts. Investigation is of such importance because it goes to the heart of prevention of discrimination under Title VII, as well as under other laws that deals with honest investigation and prevention of discrimination.

However, few circuits courts that had addressed botched investigation universally held that there is not separate cause of action for botched investigation on the ground that a charging party has a remedy which is to file a claim in the

federal court. *Jordan v. Summers*, 205 F. 3d 337 (7th Cir. 2000); *Zusmer v. Richardson*, 211 F.3d 1276 (2000 WL 219745 (9th 2000); *Smith v. Casellas*, 119 F. 3d 33 (D.C. Cir. 1997), cert. Denied, 522 U.S. 958 (1997); *McCottrell v. EEOC*, 726 F. 2d 350, (7th Cir. 1984).

Benefits of investigation, such as unbias searches, are crucial in a discrimination claim. If the lower courts' decisions are upheld, then not only would plaintiffs' burden heighten, then employers would refuse or botch investigations of discrimination for various reasons. Petitioner was denied a proper investigation of her claim. As a result, she was forced to prove her claims by circumstantial evidence to create an inference of unlawful discrimination. Under this approach, the Petitioner has the initial burden of proving a prima facie case. If the Petitioner succeeds in discharging her initial burden, the burden of production shifts to the employer to articulate a legitimate nondiscriminatory reason for the challenged employment decision. The Petitioner claims that the Employer failed to meet its burden.

Even if the Employer met its burden of production, the Petitioner must then be afforded the opportunity to establish, by the preponderance of the evidence, that the proffered reason is merely a pretext for discrimination. The Petitioner's burden of demonstrating pretext merges with her ultimate burden of persuading the trier of fact that he was subjected to unlawful discrimination. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Burdine Id.*; *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983); *and St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993). However, if the investigation is unfair, then a

claimant would have a difficult time to meet the standards. The lower courts decisions must be vacated since they fail to balance an unfair investigation with burdens of proof. Employers' unfair employment tactics in violation of Title VII would be less scrutinized.

Investigations provide due process. *Thomas v. United States*, 47 Fed.Cl. 560 (2000). Petitioner was entitled to due process in the investigatory stage, not being shuffled and retaliated against by her employer. *Weaver v. United States*, 46 Fed.Cl. 69 (2000). Petitioner asked whether there could be a meeting where she was present so that she could hear these other employees' version of events at the social function. The Employer denied the request and a decision was rendered based on phone conversations. Petitioner was denied any access to the witnesses and investigation until after she was terminated and litigation commenced. Since there was no proper investigation by the Employer since witnesses were unclear or forgot the alleged incident, Petitioner was denied due process, a substantive right, resulting in an adverse employment act.

Claims, such as that of the Petitioner, would never reach the jury thereby violating constitutional rights. So vital is this great constitutional right that "it is only in exceptional cases and for specific causes that a party may be deprived of it. *Grand Chute v. Winegar*, 82 U.S. 373, 375 (1872); *Jacob v. New York City*, 315 U.S. 752, 752-753 (1942). The right of jury trial in civil cases at common law is a "...right so fundamental and sacred to the citizens that it should be jealously guarded by the courts". *Id.* Petitioner's case must fall to the jury in order to preserve her substantive right of

the opportunity to be heard. Due Process Clause of the Fourteenth Amendment. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 195, 103 S.Ct. 2706, 2709, 77 L.Ed.2d 180 (1982); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950); Supreme Court's Construction of Due Process: 77 L.Ed.2d. 1485 (1999). The fundamental requisite of due process is the opportunity to be heard. Applying the fundamental principles of due process, it is readily apparent that the lower courts misapplied the basic constitutional concepts – Petitioner was not given a reasonable opportunity to present her case from an arbitrary or unjust appropriation. Instead her case was dismissed upon a summary judgment because the District Court failed to provide the correct standard in a discrimination case.

In *Hunt v. Cromartir*, 526 U.S. 541 (552 U.S. 1999), this court reminded the lower courts again that before granting a summary judgment, they must not weight evidence and assess credibility of the parties or evidence because that belongs to the jury. In addition, the court noted that "the nonmoving party's evidence is to be believed, and all justifiable inferences are to be drawn in that party's favor." Rather than following this guide line and standard, the lower courts deviated by making findings of facts, assessing credibility of witnesses and evidence and weighting the evidence in light most favorable to the Employer.

The Employer knew or should have known of the hostile working environment but failed to stop it; the Employer knew of the improper investigation and the botched results, but did not take any remedial measures. *See Henson v City*

of Dundee, 682 F. 2d 897 (11th Cir. 1982); *Flowers v Souther Reg'l Physician Serv. Inc.*, 247 F. 3d 229 (5th Cir. 2001); *Fox v General Motors Corp*, 247 F. 3d 169 (4th Cir. 2001). The lower courts decisions deviated from the standards.

Finally, the decision of the lower courts to summarily dismiss all the issues including those that were never investigated is contrary to this court principle of justice. Like the Employer, the lower courts conveniently avoided addressing certain issues. In so doing, the Third Circuit failed to follow this court's rules, policy, and guidelines, as well as its own rules, policy, and guidelines. All of this consideration supports a need for review.

CONCLUSION

The District Court of Pennsylvania and the Third Circuit Court of Appeals have placed a high burden of proof upon the Petitioner to overcome the minimum requirement to prove discrimination in deviation of applicable case law as well as against public policy. Moreover, the lower courts fractured the burden of proof process by failing to enforce the Employer to provide a non-discriminatory legitimate purpose in terminating the Petitioner. The Court should grant *certiorari* to review these important matters and prevent proper discrimination cases to be disposed of on summary judgment.

Respectfully submitted,

Beatrice Rosario, Pro-se

APPENDIX

APPENDIX A – JUDGMENT, DATED JUNE 5, 2006

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-3378

BEATRICE ROSARIO,

Appellant

v.

KEN-CREST SERVICES

Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civil No. 04-cv-04737)
District Judge: Honorable J. Curtis Joyner

Submitted Under Third Circuit LAR 34.1(a)
April 21, 2006:

Before: RENDELL, AMBRO and *ROTH, Circuit Judges.

JUDGMENT

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* Judge Roth assumed senior status on May 31,2006

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a). On consideration whereof, it is now here

ORDERED and ADJUDGED by this court that the order of the District Court entered June 8, 2005, be and the same is hereby AFFIRMED. All of the above in accordance with the opinion of this Court. Costs taxed against the appellant.

ATTEST:

/s/ Marcia M. Waldron
Clerk

DATED: June 5, 2006

APPENDIX B– THIRD CIRCUIT BRIEF, FILED NOVEMBER 28, 2005

CORPORATE DISCLOSURE STATEMENT
F.R.A.P. 26.1

Beatrice Rosario and Ken Crest Ser have no parent companies, non-wholly owned subsidiaries, or affiliates that have issued shares to the public.

CERTIFICATION

There are no cases or proceedings related to this case pending at this time in any United States Court.

SUBJECT MATTER JURISDICTION AND APPELLATE JURISDICTION

The United States District Court for the Eastern District of Pennsylvania exercised subject matter jurisdiction over this matter pursuant to 28 U.S.C. §1332 since federal questions (violation of EEOC) were the crux of the Appellant's complaint.

Appellate jurisdiction exists under 28 U.S.C. §1291 because the District Court of the Eastern District of Pennsylvania entered a final judgment completely disposing of all claims with respect to all parties on June 6, 2005. The Appellant timely filed a Notice of Appeal on July 8, 2005.

STATEMENT OF ISSUES ON APPEAL

I. **WHETHER THE DISTRICT COURT WRONGFULLY GRANTED THE EMPLOYER'S MOTION FOR SUMMARY JUDGMENT SINCE THERE EXISTED MATERIAL ISSUES OF DISPUTED FACTS THAT SHOULD HAVE BEEN RESOLVED BY A TRIER OF FACT AND THAT THE EMPLOYER FAILED TO MEET ITS BURDEN OF PROOF UNDER THE APPLICABLE STATUTE AND LAW OF A NON-DISCRIMINATORY LEGITIMATE PURPOSE RESULTING IN A VIOLATION OF ROSARIO'S DUE PROCESS RIGHTS?**

STATEMENT OF CASE AND FACTS

I. NATURE OF THE CASE AND PROCEEDINGS AND DISPOSITION BELOW.

The underlying action involved the wrongful termination of a dedicated employee based on her national origin and race, and the former employer's failure to provide a legitimate non-discriminatory reason for her discharge.

Beatrice Rosario, the Plaintiff-Appellant, hereinafter referred to as "Rosario", filed a complaint on October 8, 2004, against her former employer, Ken Crest Ser, hereinafter referred to as the "Employer", in the United States District Court the Eastern District of Pennsylvania alleging employment discrimination based on her national origin and race of Liberian. (3a, 13a).

On March 15, 2005, the Employer filed a Motion for Summary Judgment. (14a, 16a-33a). Rosario filed an Opposition on April 1, 2005. (14a, 37a-46a). The District Court granted the Employer's motion on June 6, 2005. (3a, 14a).

As a result, Rosario timely filed a Notice of Appeal to this Honorable Court on July 8, 2005. (1a, 14a).

II. STATEMENT OF FACTS.

Rosario is a black female born in Liberia, Africa. (37a). She worked as a Community Home Supervisor with the Employer for approximately eleven and a half years. (3a). Originally she was a direct caregiver, and after four and a half years, she was promoted to Community Home Supervi-

sor due to her outstanding work. (3a, 38a). The Employer's policy was to approach an employee and ask whether they wanted a higher position. After Rosario was once approached, she was never considered again for any other vacancy, including a Program Director job that she had more qualifications, education and experience than the hired person. (40a, 50a-51a).

On August 30, 2003, the Employer had a social function at one of their facilities. Rosario attended the function. (38a). At the function, one of the consumers, Mario Garcia, was sitting outside the building with others. Thereafter, Mr. Garcia started to continuously refer to Rosario as a "bitch". (38a). After several times, Rosario approached Mr. Garcia, tapped him on the shoulder, and whispered in his ear and redirected him. (38a).

A short time later, Answard Hopewall, a case manager, complained that Rosario abused and hit an Employer's resident. (64a). Rosario denied the allegation and stated that she never hit Mr. Garcia but redirected him. (38a).

The Employer instructed Pauline Baker,[1] another employee, to conduct an investigation. (66a). Ms. Baker and another employee, Priscilla Reid[2], continuously harassed the Rosario questioning her of her finances, clothes, vehicles and

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[1] Rosario learned that Ms. Baker was accused of abuse by a resident, but her position was not terminated. (58a).

[2] In fact, Ms. Reid wrote a glowing relationship about Rosario. (109a).

wedding in 2000. Rosario was continuously subjected to their conduct. Ms. Baker and Ms. Reid stated that Africans like Rosario should not be able to achieve more success than African Americans in the United States. (75a-77a). Another director, Harry Peck, continuously questioned Rosario's expenses, paperwork, shopping and time and would embarrass her when together. (41a-42a).

Among others, Ms. Baker spoke via telephone to Ibrahim Tunkara[3], Geraldine Trower[4] and Christopher Suah[5] – all of whom during the phone conversation failed to recollect the incident. (39a). Mr. Tunkara denied any abuse. (67a). Only one other employee, Sandra Brown, originally stated that she witnessed Rosario hitting Mr. Garcia on the face. (39a). Later at her deposition, she could not recall the events of the outing and testified that she saw Rosario touch Mr. Garcia with her fingers on his cheek. (39a). Rosario asked whether there could be a meeting where she was present so that she could hear these other employees' version of events at the social function. (63a). Ms. Baker denied the request and she based her opinion just on phone conversations. (63a).

After the internal investigation, the Employer concluded that the incident occurred. (3a-4a). On September 15, 2004,

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[3] Mr. Tunkara testified that she did not witness the incident. (111a).

[4] Ms. Trower testified that she did not witness an incident. (112a).

[5] Mr. Suah wrote a statement that he did not see anything or observe the incident. (110a).

she was terminated from her position. (3a). Rosario appealed her termination to the Director of Philadelphia Residential Services, Maggie Bolin, who upheld the decision and referred Rosario to the next person in command Director of Residential Services Mr. Harry Peck, but it still was upheld. (40a, 83a, 118a).

Rosario claimed that she was terminated due to her race (black) and national origin (Liberia). (3a). She appealed the decision to the Director. (119a). Meanwhile, Ms. Reid, a friend of Ms. Baker, was hired to fill Rosario's position – even prior to the conclusion of the investigation and appeal process. (41a, 52a).

As a result of her wrongful termination, Rosario filed an employment discrimination case against the Employer. (3a). She originally filed a Charge of Discrimination with the Pennsylvania Human Relations Commission on January 13, 2004. (102a-103a). The complaint was dismissed. (107a).

On December 8, 2004, she filed a Complaint in the District Court. (13a).

STANDARD OF REVIEW

This Court must review the District Court's decision to grant summary judgment under its plenary standard of review. *See* Curley v. Klem, 298 F.3d 271, 276 (3d Cir.2002); *Chase Manhattan Bank, N.A. v. Government of the Virgin Islands*, 300 F.3d 320, 322 (3d Cir.2002). Affirming the grant of summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See* Curley, 298 F.3d at 276-77 (quoting Fed.R.Civ.P. 56).

SUMMARY OF ARGUMENT

The District Court failed to apply the proper summary judgment standard since there were genuine issues of material disputed facts and that all inferences were to be weighed in Rosario's favor. The lower court usurped the role of the jury and opined as to motive, intent, discrimination, and performance.

The court erroneously concluded that Rosario failed to meet the criteria in proving discrimination. However, there are genuine issues of facts, and at minimum inferences in Rosario's favor, to prove each element of the cause of action. Moreover, given the necessary burdens of proof, the Employer failed to provide a reasonable non-discriminatory explanation of its decision under the applicable case law.

Thus, the District Court's opinion must be reversed and a trial scheduled on the merits of the case.

ARGUMENT

I. THE DISTRICT COURT WRONGFULLY GRANTED THE EMPLOYER'S MOTION FOR SUMMARY JUDGMENT SINCE THERE EXISTED MATERIAL ISSUES OF DISPUTED FACTS THAT SHOULD HAVE BEEN RESOLVED BY A TRIER OF FACT AND THAT THE EMPLOYER FAILED TO MEET ITS BURDEN OF PROOF UNDER THE APPLICABLE STATUTE AND LAW OF A NON-DISCRIMINATORY LEGITIMATE PURPOSE RESULTING IN A VIOLATION OF ROSARIO'S DUE PROCESS RIGHTS.

Introduction

A dismissal ought not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v Gibson*, 355 U.S. 41, 46 (1957). Dismissal with prejudice is a harsh sanction to be resorted to only in extreme cases and is within the court's sound discretion; court must give full regard for severity of the sanction, granting dismissal sparingly and only when less drastic alternatives have been explored. *Jones v. Smith*, 99 F.R.D. 4 (1983). Courts may not dismiss a complaint for insufficiency unless it clearly appears that by no stretch of the imagination is plaintiff entitled to any relief for claims asserted in his complaint. *Kozlowski v. Ferrarra*, 117 F.Supp. 650 (1954). Given this high standard of proof, Rosario should have been given the opportunity to present her case before the jury -- no jury has had the opportunity to

weigh the evidence of her discrimination allegations since the District Court entered summary judgment based upon her alleged failure to meet her burden of proof. The District Court failed to recognize the material issues of disputed facts as to whether an incident actually occurred. Since the inferences should have been made in Rosario's favor, it was, in fact, the Employer's failure to provide a legitimate purpose for terminating Rosario.

Moreover, the District Court failed to allow further discovery as to whether non-members of the protected class were treated more favorably or that the circumstances of her termination raise an inference of discrimination. Thus, Rosario was entitled to conduct further discovery as to these issues as well as have her case presented to a jury.

A) The Employer failed to meet its burden of proof under Fed.R.Civ.P. 56.

When considering whether to grant summary judgment, the Court must determine whether the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits show that there is a genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). In making this assessment, the Court must "accept all reasonable inferences favorable to the nonmovant." *Feliciano v. State of Rhode Island,* 160 F.3d 780. 788 (1st Cir. 1998). A factual dispute, which is neither "genuine" nor "material", will not survive a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L.Ed.2d 202, 106 S.Ct. 2505 (1986). The District Court erred in stating that

Rosario's "own recollection of the events leading to her termination is not sufficient to raise an inference of discrimination." (8a). The District Court failed to give credence that Rosario was harassed by two coworkers and questioned her financial status. (75a). Rosario testified that two employees Priscilla Reid and Paula Baker frequently questioned her regarding her finances, her income, her income's finances, her wedding, her vehicle. (76a). Moreover, these same two women commented to others, including another former employee Gertrude Murphy, that Rosario was flamboyant even though she was African. (76a-77a). The negative comments commenced after Rosario's wedding in August of 2000 until she was terminated. (76a-77a). Such continuous negative comments regarding Rosario's "African" background and financial status inferred a discriminatory pattern of behavior. Answard Hopewall, a case manager, also referred her to as "African". (8a-9a, 73a). Rosario wanted to be referred to as an American since obviously at the workplace being "African" was not a compliment. Even though there were other Africans who worked with the Employer, Rosario was discharged because she was Liberian. She was not born in the United States, and thus, treated and regarded different than the African-Americans. Nonetheless, such pattern of behavior that the Employer allowed was sufficient to create a genuine issue of material fact to overcome summary judgment.

In deciding whether a factual dispute is "genuine," the Court must determine whether the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.*; *see also Fajardo Shopping Center, S.E. v. Sun A-*

lliance Ins. Co. of Puerto Rico, Inc., 167 F.3d 1, 7 (1st Cir. 1999); *De-Jesus-Adorno v. Browning Ferris Indus. Of Puerto Rico,* 160 F.3d 839, 841-842 (1st Cir. 1998) ("A trial worthy issue exists... [if] the evidence is 'sufficiently open-ended to permit a rational factfinder to resolve the issue in favor of either side.'"); *Feliciano* at 784; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25, 106 S.Ct. 2548 (1986). In weighing whether a factual dispute is "material," the Court must examine the substantive law of the case, because "only disputes over the facts that might affect the outcome of the suit under governing law will properly preclude the entry of summary judgment." *Anderson* at 248; see also *De-Jesus-Adorno* at 841-42 ("A trialworthy issue exists if the evidence is such that there is a factual controversy pertaining to an issue that may affect the outcome of the litigation under the governing law.") In our facts, trialworthy disputed material facts existed, that is, whether the incident actually occurred and whether her termination was based upon discriminatory practices.

The party moving for summary judgment "bears the initial burden, which may be discharged by pointing to the absence of adequate evidence supporting the nonmoving party's case." *Michelson v. Digital Financial Svcs.*, 167 F.3d 715, 720 (1st Cir. 1999). After the moving party has met its burden, "the onus is on the nonmoving party to present facts that show a genuine issue for trial." *Id.* The Employer failed to meet its burden that Rosario could not present sufficient evidence. Given the burden to prove discrimination, as further discussed below, there was adequate evidence to overcome summary judgment. Rosario has met her burden of proof to

meet the elements of each cause of action, and at minimum, the inferences ruled in her favor overcome the standard and should have allowed the case to go to the jury.

A) **There existed genuine issues of disputed material fact as to whether the Employer terminated Rosario based on a discriminatory reason.**

Given the questionable evidence of whether an incident even occurred, the Employer terminated Rosario on a discriminatory motive. Employment discrimination cases should be disposed of at summary judgment only with "extreme caution". *See Beard v. Annis*, 730 F.2d 741, 743 (11th Cir. 1984).

To constitute an adverse employment action, an act must result in a loss in pay or benefits, a detrimental change in responsibilities, a negative change in the terms and conditions of employment, or some such actual and unfavorable change in job status. *Birone v. Indian River Sch.*, 145 F.3d 1329 1998. Of course, Rosario had a change of terms of her employment opportunities that was based on a discriminatory practice.

Rosario submitted sufficient circumstantial evidence to meet her burden of proof; however, her right was wrongfully taken away. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), the Supreme Court established the standard necessary for Rosario to meet her burden of proof with respect to her discrimination claim. The Court stated that in order to establish a prima facie case of discriminatory treatment under the evi-

dentiary framework in Title VII of the Civil Rights Act of 1964 cases, the plaintiff must prove that: (1) he/she belongs to a racial minority; (2) he/she applied and was qualified for a job for which the employer was seeking applicants; (3) despite the plaintiff's qualifications, the plaintiff was rejected; and (4) after such rejection, the position remained open and the employer continued to seek applicants from persons of the plaintiff's qualifications. Once the plaintiff has met this initial burden, the burden of production shifts to the employer to articulate some legitimate, nondiscriminatory reason for the plaintiff's rejection; if the trier of facts finds that the elements of the prima facie case are supported by a preponderance of the evidence and the employer remains silent, then the court must enter judgment for the plaintiff. *Id.* The circumstantial evidence was overwhelming.

Contrary to the lower court's decision, Rosario met the four prong test under *McDonnell Douglas,* including the fourth prong. The District Court stated that Rosario did not "satisfy the fourth prong of the *McDonnell Douglas* standard. Specifically, she fails to demonstrate that either nonmembers of the protected class were treated more favorably, or that the circumstances of her termination raise and inference of discrimination." (7a-8a). There was conflicting evidence of whether an incident even occurred. Rosario was denied promotions on two occasions. (51a-52a). Also, even though the Employer hired a black female to fill the Program Director position that Rosario deserved, the issue was where the new Program Director was born, since the Employer's administrators have a pattern of behavior for those born in Africa. (51a-52a).

Thus, Rosario properly argued discrimination by circumstantial evidence, all of which must be ruled in her favor under Fed.R.Civ.P. 56. Since the case was before the lower court on a summary judgment, Rosario was entitled to the inference that the Employer discriminated against her due to her race.

In light of the recent case law stated in *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133 (2000), Rosario met her burden of proof. The *Reeves* case has clarified a controversy which existed in the federal circuits regarding a claimant's burden of proof in a discrimination action. Under *Reeves*, once the *McDonnell* criteria for establishing a prima facie case have been met, then the employer must come forward with a legitimate, non-discriminatory basis for its actions. If the employer's explanation is found not to be credible, then a finding of unlawful discrimination may be sustained, and the claimant does not need to produce further evidence of discriminatory intent. The Supreme Court justified its decision by stating that once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision. *Id.*

Under the *Reeves* standard, once Rosario met the four *McDonnell* criteria, then if the Court finds that the Employer's explanation of its actions not to be credible, there must be a finding of discrimination. There is no more shifting of burdens of proof and persuasion back to Rosario. The Employer cited unsubstantiated and conflicting reasons for the termination.

Under the test, the burden then shifted to the Employer to prove that they had a legitimate non-discriminatory reason for taking the action. The Employer had misleading and false statements to respond to the discrimination allegations. There was no conclusive evidence or proof, just mere allegations of a hitting incident. Instead, Rosario submitted evidence of satisfactory and exceptional performance appraisals. Proof that the employer's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination even though it is persuasive. *St. Mary*, at 517. In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. *Wright v. West*, 505 U.S. 277, 296, 112 S.Ct. 2482 (1995). As emphasized, it is the trier of fact, and not the judge on a summary judgment motion, to weigh the credibility of the explanation. Rosario was entitled to the inference that she had met the fourth prong of the *McDonnell Douglas* analysis, and thus, the district court erred in granting the motion. Contrary to the District Court's opinion, Rosario presented evidence to dispute the legitimate reason for her termination – evidence that the incident did not occur and evidence of a pattern of behavior that the Employer had towards Africans.

Rosario was entitled to inferences in her favor that there was no legitimate reason for the Employer's decision. If given the opportunity, Rosario would submit substantial evidence to discredit any proffered reason that discrimination was more likely than not a motivating or substantial cause of the adverse action. *See Fuentes v. Perskie*, 32 F.3d 759, 764

(3rd Cir. 1994); *Torre v. Casio, Inc.*, 42 F.3d 825, 830 (3rd Cir. 1994). The above cited material disputed facts should have overcome the Employer's motion for summary judgment. Rosario was entitled to inferences in her favor. The material disputed facts should have been determined by a jury factfinder.

Discrimination exists "in forms as myriad as the creative perverseness of human beings can provide. *McCorstin v. United States Steel Corp.*, 621 F.2d 749, 753-54 (5th Cir. 1980). Rosario was discriminated against due to her race. She must be given the opportunity to pursue her constitutional rights of being heard and be treated equally under the laws.

Under the applicable law, Rosario was entitled to the inference that she met her burden of proof. Further, Rosario was entitled that the reasons were pretext and that there were no legitimate non-discriminatory reasons for her layoff. Thus, summary judgment was wrongfully granted.

B) **The Employer failed to provide any legitimate non-discriminatory response for Rosario's discharge.**

The employer's explanation of its legitimate reasons must be clear and reasonably specific. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 250 (1981). Of course, in our facts, the Employer submitted unsubstantiated allegations of a "hitting" incident with a patient.

Determinations of motive and intent, particularly in discrimination cases are questions better suited for the jury.

Petitti v. New England Telephone and Telegraph Co., 909 F.2d 28, 34 (1st Cir. 1990). Obviously, the Employer's motive and intent were central issues to the underlying cause of action. All of the above issues of disputed facts to establish the Employer's true intent must be presented to a jury.

Discrimination can be proved with direct or indirect evidence. *Meeks v. Computer Data Association International*, 15 F.3d 1013, 1019 (11th Cir. 1994); including presenting a statistical pattern in the actual workplace where the discrimination occurred. *Earley v. Champion International Corp.*, 907 F.2d 1077, 1081 (11th Cir. 1990). When there is evidence of disparate treatment as well as other circumstantial evidence, there is sufficient evidence of proof of pretext discrimination; the evidence does not need to reach the degree of certainty required of plaintiffs who present no proof of discrimination besides disparate treatment. *Scott v. County of Ramsey*, 180 F.3d 913 (1999). As evidenced in the facts, Rosario received disparate treatment since she was African and the overwhelming circumstantial evidence supports her claims of discrimination.

Rosario showed a pattern of discriminatory behavior both prior to and after her complaints with the Employer thereby meeting her burden of proof to overcome a motion for summary judgment. *Smith v. St. Louis University*, 109 F.3d 1261 (8th Cir. 1997); *Harris, supra, at* 21. A statistical evidence of pattern of discrimination coupled with other evidence is a pretext for an employment discrimination case. *Bell v. Bolger*, 708 F.2d 1312 (1983). The statistical pattern is direct evidence that overcomes the standard for a motion for sum-

mary judgment. *See Kerns v. Capital Graphics, Inc.*, 178 F.3d 1011(1999).

Given the pattern of behavior, and such material disputed fact, summary judgment was improper since the Rosario overcame her burden. Further, the Employer failed to provide a legitimate non-discriminatory reason for Rosario's discharge. On summary judgment, Rosario was entitled to the inference that the Employer's reasons were pretext and that there were no legitimate non-discriminatory reasons for her layoff. The factfinder, a jury, should have been entitled to weigh the inferences and determine whether or not there was a pretext to discriminator. The District Court failed to apply the proper summary judgment standard, thereby violating Rosario's procedural due process.

C) **Rosario's constitutional due process rights were violated since she was wrongfully denied in having her viable complaint heard by a trier of facts.**

Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care. *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935); *Chauffeurs, Teamsters and Helpers v. Terry*, 110 S.Ct. 1339, 1344-45 (1990). So vital is this great constitutional right that "it is only in exceptional cases and for specific causes that a party may be deprived of it. *Grand Chute v. Winegar*, 82 U.S. 373, 375 (1872); *Jacob v. New York City*, 315 U.S. 752, 752-753 (1942). The right of jury trial in civil cases at common law

is a "...right so fundamental and sacred to the citizens that it should be jealously guarded by the courts". *Id.* The jury trial is not merely a procedural device, but, a fundamental right and an essential element of self government which the drafters of the Bill of Rights sought to preserve. To safeguard that right from judicial usurpation, the Seventh Amendment prohibits federal courts from taking away the role of the jury.

Under the United States Supreme Court's precedents as to whether there is a statutory or constitutional right to a jury trial on a civil claim under a federal statute, before the court inquiries into the applicability of the federal constitution's Seventh Amendment, the court must first ascertain whether a construction of the statute if fairly possible by which the constitutional question may be avoided; if there is no statute then it is a constitutional question. *City of Monterey v. Del-Monte Dunes*, 526 U.S. 687, 119 S.Ct. 1624 (1999).

Consistent with the textual mandate of the federal constitution's Seventh Amendment that the right to a jury trial be preserved in suits "at common law," the United States Supreme Court, in interpreting the Seventh Amendment, (1) asks whether the court is dealing with a cause of action that either was tried at law at the time of the founding or is at least analogous to one that was; and (2) if the action in question belongs in the law category, then asks whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791. *Id*; *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376, 134 L.Ed. 2d 577, 116 S.Ct. 1384 (1995).

Rosario's case must fall to the jury in order to preserve her substantive right of the opportunity to be heard. Due Process

Clause of the Fourteenth Amendment. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 195, 103 S.Ct. 2706, 2709, 77 L.Ed.2d 180 (1982); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950); Supreme Court's Construction of Due Process: 77 L.Ed.2d. 1485 (1999).

The fundamental requisite of due process is the opportunity to be heard. Applying the fundamental principles of due process, it is readily apparent that the lower courts misapplied the basic constitutional concepts – Rosario was not given a reasonable opportunity to present her case from an arbitrary or unjust appropriation. Instead her case was dismissed upon a summary judgment because the District Court failed to provide the correct standard in a discrimination case.

Investigations provide due process. *Thomas v. United States*, 47 Fed.Cl. 560 (2000). Rosario was entitled to due process in the investigatory stage, not being shuffled and retaliated against by her employer. *Weaver v. United States*, 46 Fed.Cl. 69 (2000). Rosario asked whether there could be a meeting where she was present so that she could hear these other employees' version of events at the social function. (63a). The Employer denied the request and a decision was rendered based on phone conversations. (63a). Rosario was denied any access to the witnesses and investigation until after she was terminated and litigation commenced. Since there was no proper investigation by the Employer since witnesses were unclear or forgot the alleged incident, Rosario was denied due process, a substantive right, resulting in an adverse employment act.

CONCLUSION

For the foregoing reasons, Rosario, the Appellant, respectfully request that this Honorable Court reverse the District Court's decision, allow the case to proceed to trial, and such other relief that the Court deems just and proper.

Respectfully submitted,

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Beatrice Rosario, Pro-se

AFFIDAVIT OF SERVICE

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 05-3378

BEATRICE ROSARIO,

Appellant,

v.

KEN CREST SER,

Appellee.

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF PHILADELPHIA

I, Frederick W. Wright, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

I am retained by Beatrice Rosario, Pro-se Appellant, that on this 28th day of November 2005, I deposited two copies of the Brief and Appendix for Appellant, Volumes I and II, with the United States Post Office priority mail to the following:

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Filing to the Court has been perfected on the same date as above.

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APPENDIX C- ORDER, DATED JULY 8, 2005

TO

U.S. COURT OF APPEALS – THIRD CIRCUIT

U.S. DISTRICT COURT: Estrn Dist. of Penn, 6th & Market

U.S. TAX COURT [ ] Circuit Court
Docket No. _____

Beatrice Rosario Plaintiff
District Court or _____
Tax Court
Docket Number: _____

vs.

Ken-Crest Services Dept. Defendant
District Court or
Tax Court
Judge _____

Notice is hereby given that Beatrice Kyne-Rosario

appeals to the United States Court of Appeals for the Third Circuit from [ ] Judgment [x] Order

[ ] Other (specify):

---

entered in this action on June 6, 2005
(Date)

DATED: July 8, 2005

_____ Counsel for Appellant

_____ Counsel for Appellee

Named of Counsel –Typed

Address

Address

Telephone No. of US Gov.

APPENDIX D- MEMORANDUM AND ORDER, FILED JUNE 7, 2005

Beatrice Rosario	:	Civil Action
Plaintiff	:	
vs.	:	No.04-CV-4737
	:	
Ken-Crest Services	:	
Defendant	:	

MEMORANDUM AND ORDER

JOYNER, J. **June 6, 2005**

This employment discrimination case is now before the Court resolution of the Defendant's Motion for Summary Judgment. For the reasons which follow the Motion is Granted.

By this lawsuit, Plaintiff Beatrice Rosario alleges that she was terminated from her position as a Community Home Supervisor with Ken-Crest Services because of her race (black) and national origin (Liberian). Up until Plaintiff was terminated on September 15, 2003, she had been employed with Ken-Crest for approximately eleven and one-half years and had been promoted from Direct Caregiver to Community Home Supervisor.

For its part, Defendant disputes the Plaintiff was terminated because of her race and/or national origin, arguing in-

stead that she was terminated because she abused a resident. Defendant asserts that Plaintiff was terminated after an internal investigation confirmed that Plaintiff struck a resident during a Ken-Crest social function.

Standards Governing Summary Judgment Motions

In deciding a motion for summary judgment under Fed.R.Civ.P. 56 (c), a court must determine "whether there is a genuine issue of material fact and, if not, whether the moving party is entitled to judgment as a matter of law." Medical Protective Co. v. Watkins, 198 F.3d 100, 103 (3d Cir. 1999) (internal citation omitted). Indeed, Rule 56 (c) provides that summary judgment is properly rendered:

> [I]f the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Stated more succiently, summary judgment is appropriate only when it is demonstrated that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett,477 U.S. 317, 322-32 (1986).

In deciding a motion for summary judgment, all facts must be viewed and all reasonable inferences must be drawn in

favor of the non-moving party. Troy Chemical Corp. v. Teamsters Union Local No. 408, 37 F.3d 123, 125-26 (3d Cir. 1994); Oritani Savings & Loan Assn. v. Fidelity & Deposit Co. of Md., 989 F.2d 635, 538 (3d cir. 1993). An issue of material fact is said to be genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

In Celotex Corp. v. Catrett, supra, the Supreme Court articulated the allocation of burdens between a moving and nonmoving party in a motion for summary judgment. Specifically, the Court in that case held that the movant had the initial burden of showing the court the absence of a genuine issue of material fact, but that his did not require the movant to support the motion with affidavits or other materials that negated the opponent's claim. Celotex, 477 U.S. at 323. The Court also held that Rule 56(e) requires the nonmoving party to "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Id. at 324 (quoting Fed.R.Civ.P. 56(e)). This does not mean that the nonmoving party must produce evidence in a form that would be admissible at rial in order to avoid summary judgment. Obviously, Rule 56 does not require the nonmoving party to depose its own witnesses. Rather, Rule 56(c) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves, and it is from this list that one would normally expect the nonmoving party to make the required

showing that a genuine issue of material fact exists. Id. See also Morgan v. Havir Mfg. Co., 887 F.Supp. 759 (E.D. Pa. 1994); McGrath v. City of Phila., 864 F.Supp. 466, 472-73 (E.D. Pa. 1994).

Discussion

A. The McDonnell Douglas Framework

Discrimination claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 (e), *et seq.*, as amended by the Civil Rights Acts of 1991, 42 U.S.C. § 1981(a), are analyzed under the framework set forth by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Under this burden-shifting framework, a plaintiff must first established a *prima facie* case of discrimination. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142 (2000). Once a *prima facie* case is established, the Burden shifts to the defendant to produce a legitimate non-discriminatory reason for the plaintiff's discharge. Reeves, 530 U.S. at 143. Once a legitimate non-discriminatory reason is offered, the plaintiff must produce sufficient evidence for a reasonable fact-finder to conclude by a preponderance of the evidence that the non-discriminatory reason offered by the employer was merely a "pretext" for unlawful discrimination. Id.

Absent direct evidence of discrimination, a plaintiff alleging wrongful termination based on race or national origin discrimination under Title VII and 42 U.S.C. § 1981[1] must establish that: (1) she is a member of a protected class, (2) she is qualified for the position in question, (3) she suffered an adverse employment action, and (4) either non-members of the protected class were treated more favorably that the plaintiff, or the circumstances of the plaintiff's termination give rise to an inference of racial discrimination. McDonnell Douglas, 411 U.S. at 802; Goosby v. Johnson & Johnson Med., Inc., 228 F.3d 313, 318-19 (3d Cir. 2000); Pivirotto v. Innovative Sys., Inc., 191 F.3d 344, 356 (3d Cir. 1999).

B. Plaintiff Has Failed to Establish a *Prima Facie* Case

Plaintiff in this action fails to establish *prima facie* case of discrimination. Although Plaintiff has shown that, as an African-American Liberian, she is a member of a protected class; that she is presumptively qualified for the position in

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[1] The McDonnell Douglas standard is used to analyze employment discrimination claims under both Title VII and 42 U.S.C. § 1981. Pamintuan v. Nanticoke Memorial Hosp., 192 F.3d 378, 385 (3d Cir. 1999); Stewart v. Rutgers, The State Univ., 120 F.3d 426, 432 (3d Cir. 1997). Accordingly, the proof required for a plaintiff to prevail under 42 U.S.C. § 1981 is identical to that required in a Title VII case. See Harris v. SmithKline Beecham, 27 F.Supp. 2d 569, 576 (E.D. Pa. 1998) (applying the same analysis to race discrimination claims under Title VII and 42 U.S.C. § 1981); Lewis v. Univ. of Pitt., 725 F.2d 210, 915 n.5 (3d Cir. 1983) (explaining that a 42 U.S.C. § 1981 claim "requires the same elements of proof as a Title VII action").

question, given that she had held it for nearly twelve years; and that she suffered an adverse employment action by having been terminated; Plaintiff does not satisfy the fourth prong of the McDonnell Douglas standard. Specifically, she fails to demonstrate that either non-members of the protected class were treated more favorably, or that the circumstances of her termination raise an inference of discrimination.

The events leading to the Plaintiff's discharge began when Answad Hopewell, a black Case Manager, levied a complaint against Plaintiff for abusing a Ken-Crest resident. (Rosario Depo. P.71-72). In response to the allegation, Pauline Baker, a black Ken-Crest employee, conducted an investigation. Id. at 78. After Sandra Brown, a black Community Home Supervisor, confirmed the abuse allegation, Plaintiff was discharged. Id. at 53, 111. Following her termination, Plaintiff appealed but her termination was upheld by Harry Peck, a black Director of Residential Services. Id. at 147-48. Accordingly, Plaintiff's own recollection of the events leading to her termination is not sufficient to raise an inference of discrimination.

Plaintiff attempts to substantiate her discrimination claim by alleging that she was "harassed" by two coworkers, both black females, who asked Plaintiff about her financial status. Id. at 114-15. However, Plaintiff provides no evidence to support her belief that her coworkers asked these questions due to her race and/or national origin. Id. at 119. Furthermore, Plaintiff failed to allege either coworker's "harassment" in the EEOC Charge of Discrimination, and thus any claims arising out of those actions are waived.

Similarly, Plaintiff alleges that a coworker told her that Answad Hopewell, an African-American case manager, referred to another case manager as "the guy down there who employs all the Africans." Id. at 106. However, Plaintiff incorrectly relies exclusively on this hearsay evidence as proof that Hopewell was "personally biased" against her. Id. Furthermore, even if this Court viewed Hopewell's comment as displaying bias against Africans, hearsay evidence cannot be considered to defeat a summary judgment motion. See Blackburn v. United Parcel Serv., 179 F.3d 81, 95 (3d Cir. 1999) (explaining that hearsay evidence usually should not be considered on a summary judgment motion).

Plaintiff likewise fails to show that non-members of the protected class were treated more favorably. Although Plaintiff alleges that on two occasions during the course of her employment she was denied promotions, Plaintiff admits that she never applied for either position. Id. at 17, 23. Moreover, Ken-Crest hired a black female to fill the Program Director position that Plaintiff felt she deserved. Id. at 17.

C. Plaintiff Has Failed to Offer Sufficient Evidence for a Reasonable Fact-Finder to Conclude that Defendant's Reason for Plaintiff's Discharge Was Pretextual

Even if Plaintiff's evidence was sufficient to establish a *prima facie* case of discrimination, Defendant has articulated a legitimate non-discriminatory reason for plaintiff's discharge. Defendant asserts that Plaintiff's termination resulted from abuse of mentally disabled resident. (Ans., ¶ 14). Hopewell's report of Plaintiff's abusive action was con-

firmed by a Ken-Crest employee who witnessed the incident. (Brown Depo. P.16). Moreover, an internal investigation confirmed Plaintiff's abusive action, and upper-level officials upheld Plaintiff's termination. (Rosario Depo. P.78, 147-48). Because Ken-Crest articulates a legitimate reason for Plaintiff's termination, any presumption of discrimination from Plaintiff's *prima facie* case disappears. Accordingly, Plaintiff must "cast sufficient doubt upon the employer's proffered reasons to permit a reasonable fact-finder to conclude that the reasons are incredible." Sheridan v. E.I. DuPont de Nemours & Co., 100 F.3d 1061, 1072 (3d Cir. 1996).

Plaintiff in this action fails to present evidence to refute Ken-Crest's legitimate reason for her termination. See Jalil v. Avdel Corp., 873 F.2d 701, 707 (3d Cir. 1989) (finding that a defendant is entitled to summary judgment in a Title VII and 42 U.S.C. § 1981 action if the plaintiff cannot produce sufficient evidence of pretext to rebut the asserted nondiscriminatory reasons for the employment decision). As this Court found Plaintiff unable to establish a *prima facie* case, Plaintiff clearly lacks any ability to prove that she was wrongfully discharged as a result of racial discrimination. See Reeves, 530 U.S. at 133 (noting that employer would be entitled to summary judgment if the record conclusively revealed some other nondiscriminatory reason or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue).

D. Conclusion

Plaintiff in this action fails to establish a *prima facie* case of discrimination based on her race and/or national origin. Even if Plaintiff's evidence was sufficient to establish a *prima facie* case, Plaintiff does not offer adequate evidence from which a reasonable fact-finder could conclude that Defendant's reason for Plaintiff's discharge was pretextual. Accordingly, this Court concludes that Defendant's Motion for Summary Judgment is properly granted on all Counts of Plaintiff's Complaint.

An order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BEATRICE ROSARIO	:	
Plaintiff	:	CIVIL ACTION
vs.	:	No. 04-cv-4737
KEN-CREST SERVICES	:	
Defendant	:	

ORDER

AND NOW, this 6th day of June, 2005, upon consideration of Defendant Ken-Crest Service's Motion for Summary Judgment (Document No. 7), and Plaintiff's response thereto (Document No. 9), it is hereby ORDERED that the Motion is GRANTED and Judgment as a matter of law is hereby entered in favor of the Defendant and against the Plaintiff in no amount.

BY THE COURT:

_____

J. CURTIS JOYNER, J.

FILED
NOV 9 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-317

IN THE

Supreme Court of the United States

BEATRICE ROSARIO,

Petitioner,

v.

KEN-CREST SERVICES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioner has presented any compelling reasons to grant the Petition for a Writ of *Certiorari*, where the Third Circuit's Order affirming the District Court's June 8, 2005 Opinion does not conflict with a decision of this Court or a Court of Appeals nor does it implicate an important federal question that has not been settled by this Court.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Ken-Crest Services is a Pennsylvania Non-Stock Non-Profit corporation with no parent and/or subsidiary corporation(s).

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INTRODUCTION

Petitioner has presented no "compelling reasons" for her Petition for a Writ of *Certiorari* to be granted ("Petition"). *See* Sup. Ct. R. 10. Specifically, Petitioner fails to demonstrate that the Third Circuit's June 5, 2006 Order ("Order") affirming the District Court's June 8, 2005 Opinion ("Opinion") is in conflict with a decision of this Court or another Court of Appeals or that the Third Circuit decided an important federal question that has not been settled by this Court. *See* Sup. Ct. R. 10(a)-(c). Therefore, the Petition should be denied.

At the outset, Petitioner contends that the Third Circuit's Order creates a Circuit split because it allows district courts to apply different standards and burdens of proof in employment discrimination cases. In this case, however, both the Third Circuit and the District Court properly applied the burden-shifting framework set forth by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) to determine that Petitioner failed to establish a *prima facie* case of race or national origin discrimination under Title VII or Section 1981 since she could not demonstrate that non-members of the protected class were treated more favorably than she or that her termination was the result of discriminatory motive. Moreover, the District Court properly determined that even if Petitioner had presented evidence sufficient to establish a *prima facie* case of discrimination, she failed to present evidence to refute her employer's legitimate reason for her termination. Although Petitioner attempts to spin her discharge into illegal employment discrimination, the Third Circuit and the District Court correctly held that she cannot prove that she was discharged because of her claimed race or national origin.

Simply put, Petitioner has failed to completely carry her burden of demonstrating that there are any compelling reasons for this Court to grant the Petition. Accordingly, the Petition should be denied.

STATEMENT OF THE CASE

Ken-Crest Services (hereinafter "Respondent") is a 100-year-old non-profit human services agency that is the largest provider of community-based services and support in the Delaware Valley for people with mental retardation and other developmental disabilities. Petitioner, a long-term employee with Respondent, was terminated from her employment as a Community Home Supervisor after an internal investigation confirmed that she struck a resident of one of Respondent's facilities during a social function.

The events leading up to Petitioner's discharge began when Answad Hopewell, a Philadelphia County case manager assigned to one of Respondent's facilities, levied a complaint against Petitioner for abusing one of Respondent's residents in her care. After confronting Petitioner about her mistreatment of the resident, Mr. Hopewell, a black male, reported Petitioner's abuse to Petitioner's direct supervisor, Pricilla Reid, a black female. In response to the allegation of abuse, Respondent conducted an investigation into the allegations of abuse. Director of Philadelphia Residential Services, Maggie Bolin, a Caucasian female, assigned Program Director, Pauline Baker, to conduct the investigation into the allegations of abuse against Petitioner. Ms. Baker is of Jamaican decent.

During the course of her investigation, Ms. Baker interviewed several witnesses and attendees of the social

function, including Petitioner. One witness, Sandra Brown, a black female also employed as a Community Home Supervisor, confirmed that Petitioner had hit the resident. Following Ms. Baker's investigation, Petitioner's abuse of the resident was confirmed and Petitioner was terminated.

Following her termination, Petitioner took advantage of Respondent's grievance process and appealed her termination to Ms. Bolin, the same person who had promoted Petitioner to the position of Community Home Supervisor seven years prior. After meeting with Petitioner and reviewing Ms. Baker's investigative report, Ms. Bolin upheld Petitioner's termination. Petitioner then appealed her termination to Harry Peck, the Director of Residential Services, a black male. Mr. Peck also upheld the decision to terminate Petitioner.

Petitioner attempts to substantiate her discrimination claims by alleging that she was "harassed" by two co-workers, both black females, who asked Petitioner about her financial status. However, Petitioner provides no evidence to support her belief that her co-workers asked these questions due to her race and/or national origin. Notably, these allegations are wholly absent from Petitioner's EEOC Charge of Discrimination. (Pet. App. at 36a). The District Court correctly determined, however, that Petitioner is bound by the allegations in her EEOC charge and any allegations of harassment against these individuals were waived.

Similarly, Petitioner alleges that a co-worker told her that Mr. Hopewell, the case manager who had reported the abuse, referred to another case manager as "the guy down there who employs all the Africans." Petitioner relies exclusively on this hearsay evidence as proof that

Mr. Hopewell was "personally biased" against her. As the District Court properly determined, however, even if the Court were to view Mr. Hopewell's comments as some sort of bias against Africans, hearsay evidence cannot be considered to defeat a summary judgment motion. (Pet. App. at 37a).

Petitioner likewise fails to show that non-members of the protected class were treated more favorably. Although Petitioner alleges that on two occasions during the course of her employment she was denied promotions, Petitioner admits that she never applied for either position. Moreover, Respondent hired a black female to fill the Program Director position that Petitioner felt she deserved.

REASONS FOR DENYING THE PETITION

The decisions below do not conflict with a decision of this Court or any Court of Appeals nor do they implicate a federal question that has not been decided by this Court. Accordingly, Petitioner has not carried her burden of demonstrating any "compelling reasons" for the Petition to be granted. *See* Sup. Ct. R. 10.

I. *The District Court Properly Granted Summary Judgment In Favor Of Respondent As Petitioner Failed To Establish A Prima Facie Case Of Race And/Or National Origin Discrimination.*

Petitioner's main complaint—*i.e.*, that the District Court denied her the opportunity to present her case to a jury—reveals a fundamental misunderstanding of the burden-shifting framework established by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) to analyze

discrimination claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), *et seq.*, as amended by the Civil Rights Act of 1991, 42 U.S.C. § 1981(a) (hereinafter "Title VII"). Despite Petitioner's contentions to the contrary, the District Court applied the proper legal standard of review in evaluating Petitioner's claims of discrimination based on the record before it and determined, viewing all facts and reasonable inferences in her favor, that Petitioner failed to establish a *prima facie* case of discrimination. The District Court cogently recognized that Petitioner could not sustain a *prima facie* case of discrimination under Title VII by relying on her own self-serving statements, hearsay and accusations of harassment not previously contained in her EEOC Charge of Discrimination, and that summary judgment in favor of Respondent was appropriate.

Specifically, absent direct evidence of discrimination, to bring a claim for wrongful termination based on race or national origin discrimination under Title VII and Section 1981,[1] a plaintiff must establish that: (1) she is a member of a protected class; (2) she is qualified for the former position; (3) she suffered an adverse employment action; and (4) either

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1. This burden-shifting analysis also applies to employment discrimination claims under 42 U.S.C. § 1981. *See Pamintuan v. Nanticoke Memorial Hosp.*, 192 F.3d 378, 385 (3d Cir. 1999); *Stewart v. Rutgers, The State University*, 120 F.3d 426, 432 (3d Cir. 1997). Accordingly, the proof required for a plaintiff to prevail under 42 U.S.C. § 1981 is identical to that required in a Title VII case. *See Harris v. SmithKline Beecham*, 27 F. Supp. 2d 569, 576 (E.D. Pa. 1998) (applying the same analysis of race discrimination claims under Title VII to claims under Section 1981); *Roebuck v. Drexel Univ.*, 852 F.2d 715, 726 (3d Cir. 1988); *Lewis v. University of Pittsburgh*, 725 F.2d 910, 915 n.5 (3d Cir. 1983) (section 1981 claim "requires the same elements of proof as a Title VII action").

non-members of the protected class were treated more favorably than the plaintiff, or the circumstances of the plaintiff's termination give rise to an inference of race discrimination. *McDonnell Douglas*, 411 U.S. at 802; *Goosby v. Johnson & Johnson Med., Inc.*, 228 F.3d 313, 318-19 (3d Cir. 2000); *Pivirotto v. Innovative Sys., Inc.*, 191 F.3d 344, 356 (3d Cir. 1999). Although the *prima facie* elements of a discrimination claim vary depending on the particular facts of the case, *Sarullo v. U.S. Postal Service*, 352 F.3d 789, 797-98 (3d Cir. 2003) (*per curiam*), the plaintiff must generally present evidence that "raises an inference of discrimination." *Storey v. Burns Int'l Sec. Servs.*, 390 F.3d 760, 763-64 (3d Cir. 2004) (*quoting Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 510 (2002)).

In this case, the District Court accurately applied the *McDonnell Douglas* framework to determine that Petitioner failed to establish a *prima facie* case of race or national origin discrimination under Title VII or Section 1981. Although Petitioner has shown that, as an African-American Liberian, she is a member of a protected class; that she is presumptively qualified for the position in question, given that she had held it for nearly twelve years; and that she suffered an adverse employment action by having been terminated; Petitioner does not satisfy the fourth prong of the *McDonnell Douglas* standard. Specifically, she fails to demonstrate that either non-members of the protected class were treated more favorably, or that the circumstances of her termination raise an inference of discrimination.

Although Petitioner alleges that on two occasions during the course of her employment she was denied promotions, Petitioner admits that she never applied for either position. Moreover, Respondent hired a black female to fill the

Program Director position that Petitioner felt she deserved. Further, while Petitioner attempts to substantiate her discrimination claims by alleging that she was "harassed" by two co-workers, both black females, who asked Petitioner about her financial status, Petitioner provides no evidence to support her belief that her co-workers asked these questions due to her race and/or national origin. Similarly, Petitioner incorrectly relies exclusively on hearsay evidence as proof that Mr. Hopewell was "personally biased" against her. As the District Court properly determined, however, even if the Court were to view Mr. Hopewell's comments as some sort of bias against Africans, hearsay evidence cannot be considered to defeat a summary judgment motion. *See Brown v. Muhlenberg Township*, 269 F.3d 205, 212 n. 5 (3d Cir. 2001) (*citing* Fed. R. Civ. P. 56(e) requirements for admissible affidavits); *Blackburn v. United Parcel Serv.*, 179 F.3d 81, 95 (3d Cir. 1999) ("[A] hearsay statement that is not capable of being admissible at trial should not be considered on a summary judgment motion.").

In light of Petitioner's failure to present any evidence to establish a *prima facie* case of race or national origin, the decisions of the Third Circuit and District Court clearly do not conflict with a decision of this Court or any Court of Appeals nor do they implicate a federal question that has not been decided by this Court. Petitioner has failed to demonstrate that there are any compelling reasons for this Court to grant the Petition. Accordingly, the Petition should be denied.

II. *The District Court Properly Granted Summary Judgment In Favor Of Respondent As Petitioner Failed To Offer Sufficient Evidence To Conclude That Respondent's Reason For Her Discharge Was Pretextual.*

Petitioner further contends that the District Court failed to recognize that disputed issues of material facts existed as to whether she actually abused Respondent's mentally disabled resident. Again, this is a misunderstanding of the burden-shifting standard of *McDonnell Douglas*.

Once a *prima facie* case is established, the burden of production shifts to the defendant to produce a legitimate non-discriminatory reason for the adverse employment action taken against the plaintiff. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000). Because the burden of persuasion does not shift at this stage, the employer's legitimate non-discriminatory reason is not evaluated insofar as its credibility is concerned. *Id.* Once a legitimate nondiscriminatory reason is proffered, the presumption of discrimination created by the *prima facie* case "drops away." *Id.* At this point, the plaintiff must proffer sufficient evidence for the fact finder to conclude by a preponderance of the evidence that the legitimate non-discriminatory reasons offered by the employer were not true, but were a pretext for unlawful discrimination. *Id.*

In this case, when viewed in a light most favorable to Petitioner, the evidence presented does not even suggest racial or national origin discrimination. Rather, Petitioner was terminated because she abused a resident which was confirmed through an internal investigation. Following her termination, Petitioner took advantage of Respondent's

grievance procedure and her termination was upheld. All or most of the critical witnesses against Petitioner and the decision makers in the investigative process were African American and/or black. Based on the record before the District Court, Petitioner could not prove that she was wrongfully discharged or refute the legitimate business reason articulated by Respondent for her termination. *See Reeves*, 530 U.S. 133 (instructing that employer would be entitled to summary judgment if the record conclusively reveals some other nondiscriminatory reason or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue). *See also Traylor v. Brown*, 295 F.3d 783 (7th Cir. 2002) (affirming summary judgment to employer since (i) no *prima facie* case was proven, and (ii) assuming *prima facie* case, the employer's explanation was unrefuted). Despite Petitioner's claims to the contrary, the decisions of the Third Circuit and District Court in this case clearly do not conflict with a decision of this Court or any Court of Appeals nor do they implicate a federal question that has not been decided by this Court. Accordingly, Petitioner has not shown any compelling reasons for this Court to review this case and the Petition should be denied.

CONCLUSION

Petitioner has not established any compelling reasons for this Court to grant the Petition for a Writ of Certiorari. Therefore, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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NOV 2 2 2006
OFFICE OF THE CLERK
SUPREME COURT U.S.

No. 06-317

IN THE

Supreme Court of the United States

BEATRICE ROSARIO,

Petitioner,

v.

KEN CREST SERVICES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY OF PETITIONER

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RESPONSE TO QUESTION PRESENTED FOR REVIEW

The Petitioner recites the facts, issues, and analysis as originally set forth in her Writ for Certiorari.

Contrary to the Employer's allegations, the Petitioner has met her burden of proof of demonstrating the compelling need for this Honorable Court to resolve a conflict of the burden of proof in discrimination cases. Of course, such an important issue such as discrimination must be applied similarly among the Circuit Courts. Unfortunately, the Third Circuit misapplied the standard, and thus, the Writ must be granted.

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STATEMENT OF CASE AND FACTS

The Petitioner restates the Statement of Case and Facts as originally set forth in the Writ for Certiorari.

Also, the Petitioner urges this Court to appreciate the argument that since the Petitioner's descent was "African" that she received disparate treatment. The Employer cites one witness to the incident who was discredited by other witnesses. The Petitioner suggests that the case was not ripe for summary judgment given the Employer's improper practices and non-legitimate purpose in terminating the Petitioner. Once the Petitioner met her burden of proof, then the Employer was suppose to tender a non-discriminatory purpose which, given the overwhelming evidence, it failed to do so. Even though the Employer suggested that the Petitioner mistreated a patient, the evidence suggested otherwise.

Thus, at the summary judgment stage, where inferences are to be in the Petitioner's favor, the circumstantial and direct evidence should have weighed in the Petitioner's favor and summary judgment denied.

By misapplying the shifts in the burden of proof, the Third Circuit deviated from the applicable standard. Therefore, this Writ must be granted to clarify the "amount" of evidence necessary to provide the discriminatory practices and legitimate non-discriminatory practices.

ARGUMENT IN SUPPORT OF WRIT FOR CERTIORARI

I. THE LOWER COURTS DEVIATED FROM SUPREME COURT CASES AND FRACTURED THE BURDEN OF PROOF IN A WRONGFUL TERMINATION CASE AND WRONGFULLY GRANTED THE EMPLOYER'S MOTION FOR SUMMARY JUDGMENT EVEN THOUGH THERE EXISTED MATERIAL ISSUES OF DISPUTED FACTS AS TO THE EMPLOYER'S NON-DISCRIMINATORY LEGITIMATE PURPOSE OF TERMINATING PETITIONER THAT SHOULD HAVE BEEN RESOLVED BY A TRIER OF FACT RESULTING IN A VIOLATION OF HER DUE PROCESS RIGHTS.

The basis of the Employer's claim is that the Petitioner failed to meet the fourth prong of the *McDonnell Douglas* framework. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), the Supreme Court established that in order to establish a prima facie case of discriminatory treatment under the evidentiary framework in Title VII of the Civil Rights Act of 1964 cases, the Petitioner must prove that: (1) he/she belongs to a racial minority; (2) he/she applied and was qualified for a job for which the employer was seeking applicants; (3) despite the plaintiff's qualifications, the plaintiff was rejected; and (4) after such rejection, the position remained open and the em-

ployer continued to seek applicants from persons of the plaintiff's qualifications.

The courts failed to give credence that Petitioner was harassed by two coworkers and questioned her financial status. But the Employer as well as the lower courts failed to give credence that the Petitioner was not just treated differently because she was black, but that she was of African descent.

In its brief, the Employer attempts to emphasize all of the minorities it employs. However, once again, the Employer failed to address the pattern of behavior of treating African-descent employees different than blacks born in America. Petitioner wanted to be referred to as an American since obviously at the workplace being "African" was not a compliment. Even though there were other Africans who worked with the Employer, Petitioner was discharged because she was Liberian. She was not born in the United States, and thus, treated and regarded different than the African-Americans. Nonetheless, such pattern of behavior that the Employer allowed was sufficient to create a pattern of behavior and a genuine issue of material fact to overcome summary judgment.

Furthermore, contrary to the Employer's allegations, the Petitioner used circumstantial evidence to meet the elements of the *McDonnell* test. All of the inferences must be weighed in the Petitioner's favor. The Employer is attempting to avoid having the burden shifted to itself since it has never provided a legitimate non-discriminatory purpose to defend its acts in terminating the Petitioner.

The Employer based its decision on a patient issue, but the overwhelming evidence suggested that the incident did not occur. Without a legitimate reason, the burden never shifts back to the Petitioner.

At minimum, the inferences from the facts and evidence should have been weighed in the Petitioner's favor and summary judgment denied. In our facts, trialworthy disputed material facts existed, that is, whether the incident actually occurred and whether her termination was based upon discriminatory practices.

Moreover, the Employer simplified the holding in *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133 (2000). Under *Reeves*, once the *McDonnell* criteria for establishing a prima facie case have been met, then the employer must come forward with a legitimate, non-discriminatory basis for its actions. If the employer's explanation is found not to be credible, then a finding of unlawful discrimination may be sustained, and the claimant does not need to produce further evidence of discriminatory intent. The Supreme Court justified its decision by stating that once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision. *Id.*

The Employer failed to provide this evidence to justify termination. The alleged patient incident was at most circumstantial. The allegations regarding the incident should have been weighed in the Petitioner's favor and summary judgment denied.

Contrary to the lower courts' decisions, Petitioner met the four prong test under *McDonnell Douglas,* including the fourth prong. Circumstances of her termination raised an inference of discrimination. There was conflicting evidence of whether an incident even occurred, and Petitioner was denied promotions on two occasions. The Employer's discriminatory practice was not against blacks, but where they were born, that is either America or Africa.

The Third Circuit and District Court deviated from applicable law and created a conflict among the Circuits by misapplying the burden test. In our facts, there was no legitimate non-discriminatory reason for taking the action. The Employer had misleading and false statements to respond to the discrimination allegations. There was no conclusive evidence or proof, just mere allegations. Instead, Petitioner submitted evidence of satisfactory and exceptional performance appraisals. It was a trier of fact, and not the judge on a summary judgment motion, to weigh the credibility of the explanation. Petitioner was entitled to the inference that she had met the fourth prong of the *McDonnell Douglas* analysis.

Moreover, the Circuit Court deviated from other Circuits by accepting the Employer's explanation without any further investigation or evaluation. The employer's explanation of its legitimate reasons must be clear and reasonably specific. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 250 (1981). Of course, in our facts, the Employer submitted unsubstantiated allegations.

Even if the burden shifted back to the Petitioner, then she still overcame summary judgment by inferences of pretext discrimination. The Third Circuit and District Court never considered whether a discriminatory pattern could be among "American" versus "African" blacks. The lower courts never even opined whether there could be discrimination within a certain protected class under Title VII.

When there is evidence of disparate treatment as well as other circumstantial evidence, there is sufficient evidence of proof of pretext discrimination; the evidence does not need to reach the degree of certainty required of plaintiffs who present no proof of discrimination besides disparate treatment. *Scott v. County of Ramsey*, 180 F.3d 913 (1999). As evidenced in the facts, Petitioner received disparate treatment since she was African and the overwhelming circumstantial evidence supports her claims of discrimination.

The lower courts clearly failed to analyze the proper burdens of proof at each level. Since inferences were to be rendered in the Petitioner's favor, then summary judgment should have been denied.

CONCLUSION

The District Court of Pennsylvania and the Third Circuit Court of Appeals have placed a high burden of proof upon the Petitioner to overcome the minimum requirement to prove discrimination in deviation of applicable case law as well as against public policy. Moreover, the lower courts fractured the burden of proof process by failing to enforce the Employer to provide a non-discriminatory legitimate purpose in terminating the Petitioner. The Court should grant *certiorari* to review these important matters and prevent proper discrimination cases to be disposed of on summary judgment.

Respectfully submitted,

Beatrice Rosario, Pro-se